Judgment of the U. S. Court of Appeals, Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 72-1066

D. C. Docket No. 68-104

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee-Cross-Appellant,

versus

J. M. FIELDS, INC.,

Defendant-Appellant-Cross Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Before:

TUTTLE, WISDOM and SIMPSON,
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

Judgment of the U. S. Court of Appeals, Fifth Circuit

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court as modified in part in this cause be, and the same is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further consideration in accordance with the opinion of this Court:

It is further ordered that costs of the main appeal and cross appeal be equally taxed to the respective parties.

November 16, 1973

Issued as Mandate:

Opinion of the U. S. Court of Appeals,
Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1066

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee-
Cross Appellant,

versus

J. M. FIELDS, INC.,
Defendant-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(November 16, 1973)

Before TUTTLE, WISDOM and SIMPSON,
Circuit Judges.

SIMPSON, Circuit Judge: We review on this appeal the decision below in a case arising under the Equal Pay provisions[1] of the Fair Labor Standards Act

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[1] 29 U.S.C., §206(d).

(FLSA), Title 29, U.S.C., §201 et seq. The district court found that the appellant, J. M. Fields, Inc. (Fields) had discriminated on the basis of sex in the payment of wages to supervisory personnel in three of the sixty-odd Fields' retail outlets. The court ordered payment to named employees of the minimum wages and overtime due them under the provisions of the Equal Pay Act (EPA or the Act).[2] The court also enjoined further violations of the Equal Pay Act "... in any of [Fields'] stores now in operation or hereafter operated by it." Fields as appellant and the Secretary of Labor (the Secretary) as cross-appellant each appeal from portions of the lower court's order.

I. *BACKGROUND: THE FIELDS ORGANIZATION*

A. *The National Organization*

Fields, a subsidiary of Food Fair Stores, Inc., is a chain-store enterprise operating more than sixty retail outlets in eleven states on the Eastern Seaboard of the United States. Fields' home offices are in New York City and Philadelphia, Pa. Its territory is divided into three regions for purposes of personnel administration. Each region is headed by a director who oversees the personnel files of employees in his area. The Fields' Industrial Relations Department in New York maintains all personnel files. Initial hiring of personnel and setting of salary rates for each of the individual

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[2]Under the provisions of 29 U.S.C., §206(d)(3) amounts owing to employees as a result of violations of the Equal Pay Act are denominated "unpaid minimum wages or unpaid overtime compensation."

Fields' stores is conducted either by the regional personnel director or by a representative of the New York office. In addition, the New York office issues periodic directives detailing salary ranges appropriate for different geographical areas and classes of employees. Finally, all wage increases are subject to approval either by the regional personnel director or by the New York office.

B. *The Local Retail Outlets*

The individual Fields stores are each headed by a Store Manager and two Assistant Store Managers. Each of the departments within the store is headed by an Area Supervisor (also referred to as a Department Manager). Fields follows what is apparently an industry-wide practice of dividing its departments into two categories — softline goods and hardline goods. In softlines are included clothing and infant accessories (cribs, furniture, mattresses). The hardline departments contain all the other goods sold by Fields (housewares, cosmetics, automobile accessories and numerous other lines).

The function of the Area Supervisors in the hardline and softline departments is roughly similar, save in the matter of ordering replenishment stocks. The basic re-ordering of most softline goods is handled by a computer which is fed pre-punched portions of sales tickets removed by cashiers when the items are purchased. Re-ordering of hardline goods is based, for the most part, upon physical counts of merchandise on hand. The Area Supervisors in the hardline depart-

ments are responsible for these counts. Managers in both hardline and softline departments must be cognizant of fast-moving items and reorder accordingly.

II. *THE COMPLAINT*

On June 14, 1968, the Secretary filed a complaint alleging that Fields had violated and was continuing in violation of Sections 6(d) and 15(a)(2) of the Fair Labor Standards Act[3] in at least three of its retail outlets in Florida — those in Eau Gallie, Merritts Island, and Tallahassee. The Secretary's allegations were substantially as follows: (1) that male softline Area Supervisors were generally paid more than their female counterparts; (2) that male hardline Area Supervisors generally were paid more than their female

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[3]Section 6(d) of the FLSA, Title 29, U.S.C., §206(d), provides, in pertinent part:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, * * *.

Section 15(a)(2) of the FLSA, Title 29, U.S.C., §215(a)(2), provides in pertinent part:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —
>
> (2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title; * * *.

counterparts; (3) that softline Area Supervisors were generally female; (4) that the softline Area Supervisors were generally paid less than the hardline Area Supervisors; (5) that there was no basis for a distinction between hardline and softline Area Supervisors for the purposes of the Equal Pay Act. The Secretary further alleged that Fields had had knowledge of the provisions of the Equal Pay Act during the entire period of the violations, and, therefore, that the violations were wilful violations for the purposes of the Portal-to-Portal Act, Title 29, U.S.C., §255(a); and that this had the effect of exposing Fields to possible liability for the payment of minimum wages and overtime for a three year (rather than a two year period in the case of non-wilful violations) period prior to commencement of the Secretary's suit.

Fields' answer asserted that it had not wilfully violated the Act in that it had not intended to discriminate among its Area Supervisors according to sex. Fields alleged that it had hired its Supervisors at the going market rate and that compensation had been based solely on the going market rate and not upon sex. Fields further answered that there was a basis for differentiation between the hardline and softline managers based on the skill and responsibility required of these respective positions. Particular reference was made in this respect to the different methods of ordering goods prevailing in the two types of departments, hardline and softline.

III. *THE OPINION BELOW*

This district court entered findings of fact and conclusions of law supporting in the main the Secretary's position. The court found the existence of discrimination based upon sex in some particulars in each of the three Fields stores involved.[4] The court also found that the duties of Area Supervisor in the hardline and softline departments differed so substantially in terms of skill and responsibility as to require their being considered unequal for the purposes of the Equal Pay Act.[5] The court concluded as a matter of law that the discriminations in wages between sexes constituted violations of the Equal Pay Act.[6] The court concluded further that the discriminations were unintentional and therefore not wilful for the purposes of the Portal-to-Portal Act, Title 29, U.S.C. §255(a).[7]

The district court judgment required Fields to refrain from withholding minimum wages and overtime compensation from the employees found to have been the object of violations of the Act, and further enjoined Fields from committing violations of the Act ". . . in any of its stores now in operation and hereafter operated by it." Both parties appeal from the findings, conclusions and judgment. We now consider the issues raised on appeal.

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[4]*Hodgson v. J. M. Fields*, M.D. Fla. 1971, 335 F.Supp. 731, 732-33, Findings of Fact Nos. 10-20.
[5]Id. Findings of Fact Nos. 8, 9, and 22.
[6]Id. at 733, Conclusion of Law No. 2.
[7]Id. Conclusion of Law No. 4.

PETER J. BRENNAN v. J. M. FIELDS, INC.

IV. *THE HARDLINE/SOFTLINE DISTINCTION*

The district court found that there existed a distinction between the jobs of hardline Area Supervisor and softline Area Supervisor such that the two could not be compared for purposes of the Equal Pay Act.[•] This finding was undergirded by Findings of Fact Nos. 8 and 9:

> 8. The method of ordering in the hardline departments imposes on those Area Supervisors an *added responsibility* which required a *substantial portion of* their *working time.*[2] [Footnote 2 read: "Witness Peggy Smith, a Tallahassee hardlines supervisor testified that she spent four hours a day working on the preprint books."]
>
> 9. The *skill and responsibility* required of hardline managers is substantially greater than that required of softline managers.[•] • • [Emphasis added].

Fields urges on appeal that we not only adopt the district court's findings of the existence of a distinction between hardline and softline managers, but also that we expand the scope of the softlines category to include "curtains and domestics." On cross appeal, the Secretary urges that the distinctions between hardline and softline managers' jobs are so minimal as to require their being considered equal for the purposes of the Equal Pay Act.

[•]Id. Finding of Fact No. 22.

We begin by noting that the Findings of Fact numbered 8 and 9, and 22 are so conclusory in nature as to preclude the necessity of our applying the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., on review. *Baumgartner v. United States*, 1944, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; *Shultz v. Wheaton Glass Co.*, 3 Cir. 1970, 421 F.2d 259, 267. In this situation we are required to consider only whether the findings are correct in the light of the provisions of the Equal Pay Act, the regulations thereunder, and prior decisions.

The Equal Pay Act mandates equal pay for jobs "the performance of which requires equal *skill, effort, and responsibility*, and which are performed under *similar working conditions* . . ." * * * (E.P.A., Title 29, U.S.C., §206(d) (1). Emphasis added). The Regulations promulgated by the Department of Labor, 29 C.F.R. §800.0 et seq., provide that: "The terms" [skill, effort, and responsibility] "are considered to constitute three separate tests, each of which must be met in order for the equal pay standards to apply." (29 C.F.R. §800.122).

We noted in *Hodgson v. Brookhaven General Hospital*, 5 Cir. 1970, 436 F.2d 719, 722, that the Secretary of Labor has the burden of proving "equality of work and inequality of pay." In meeting this burden, the Secretary is, however, required only to show that the jobs under consideration are "substantially equal," *Hodgson v. Fairmont Supply Co.*, 4 Cir. 1972, 454 F.2d 490, 493. We think the Secretary met his burden in the instant case. He showed that the Area Supervisors in both hardline and softline departments were respon-

sible for ordering merchandise, for assisting customers with their purchases, and for maintaining orderly and properly displayed racks of merchandise in their respective departments. This showed that the jobs were "substantially equal."

The principal factor involved in the district court's decision that the hardline and softline managers' jobs were unequal was the different method of ordering replacement merchandise prevailing in the two types of departments. Considered in the light of the tripartite test of substantial job equality, it cannot be said that the two methods differed in terms of skill involved. The record is unsatisfactory as to the existence of a possible ground for sustaining a blanket distinction between hardlines and softlines based on either effort or responsibility.

The regulations promulgated by the Department of Labor under the E.P.A. state that "skill includes consideration of such factors as experience, training, education, and ability. . ." 29 C.F.R. §800.125. The evidence indicates no additional requirements for the position of hardline manager based on any of these factors. Indeed, the evidence as to training was precisely to the contrary: the softline managers received more extensive training in terms of time spent in the training program. Thus, we overturn the finding by the district court that the job of hardline manager required more skill than that of softline manager. Such a finding is without support in this record.

Because the findings of fact permit no conclusion on our part as to the elements of responsibility and effort involved in the different managerial positions, we remand for further findings on these two points. Our concern in this area of job equality between the two kinds of Area Supervisors is primarily with the sweeping nature of the district court's finding of job inequality and the meager support in the findings of fact for such a pronouncement. The district court found for example that the method of ordering in the hardline departments consumed a substantial portion of the working hours of the hardline managers. In support of this finding the court cited the fact that the manager of one of the hardline departments in one of the Fields' stores spent four hours a day reordering for her department.[9] This did not rebut the Secretary's proof of job equality, and does not support a finding that all hardline managers in all hardline departments spend an equal amount of time in reordering merchandise. Requisite to such a finding is proof that this single hardline Area Supervisor's experience typifies the requirements of the job of hardline manager; that the housewares manager, the garden shop manager, the automotive manager, and all the other hardline managers are required to exert this effort in order to maintain their stocks — and further, that the softline managers are not similarly required to spend this amount of time checking the stock in their departments. Any lesser amount of proof would not support the broad distinction found by the district court to exist between the two positions. Accordingly, we remand the case to the district court for further find-

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[9]Finding of Fact No. 8 and Note 2 thereto, text, supra.

ings as to the comparative degrees of effort and responsibility required in the supervision of hardline and softline departments. We add the admonition that the company-wide practice of distinguishing between hardlines and softlines is no basis without more for a conclusion of the existence of requisite distinction for purposes of E.P.A. *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 5 Cir. 1972, 468 F.2d 1256. The district court should explain its reasons for finding distinctions between hardline and softline in terms used in the Regulations. It is difficult if not impossible for us properly to evaluate district court findings and conclusions on review on any other basis.

V. *WILFUL OR NON-WILFUL VIOLATION?*

Ths district court decided as a matter of law that Fields' violations of the Equal Pay Act were not wilful for the purpose of the Portal-to-Portal Act's three-year statute of limitations on claims for minimum wages and overtime due. 29 U.S.C., §255(a). The determination was rather that the discrimination found was merely the unintended result of Fields' practice of hiring persons at whatever wage it could. The Secretary urges on cross-appeal that the district court's finding on the question of wilfulness is contrary to our holding in *Coleman v. Jiffy June Farms, Inc.*, 5 Cir. 1970, 458 F.2d 1139, 66 CCH Lab. Cas. ¶32,588, rendered some five months after the findings and conclusions were entered in the instant case.

In *Jiffy June Farms*, we considered a violation of the Fair Labor Standards Act occurring within the context of a collective bargaining agreement in which the employees had agreed to exempt themselves from

FLSA provisions in exchange for a raise in pay. The record there disclosed in addition that the employer had sought and secured advice of counsel that this arrangement would in fact exempt the employees from the FLSA. Judge Wisdom, speaking for the court, proposed the following as the test of wilfulness to be applied in cases concerned with civil liability for violations of the FLSA: "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" Id. at 1142. Judge Wisdom stated: "The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent." Id.

In the instant case, the record discloses that Fields' central office sent memoranda to its district managers and store managers advising them of the implementation of the E.P.A., and of the requirements of the Act. In addition, Fields' regional personnel managers were under instructions to make periodic examinations of the personnel files of the Fields stores and to report any possible violations of the E.P.A. to the New York office. This was sufficient to establish that Fields knew "that the FLSA was in the picture." In defense of the district court finding Fields argues that the random pattern of wage discrimination together with the cessation of *per se* violations of the Act prior to trial indicates that the violations were negligent and not wilful. We apply the test as enunciated in *Jiffy June Farms*, supra, as the correct test. To allow exceptions for "random" discrimination or in situations where an employer, once charged with violating the Act, cor-

rects the unlawful practice, would sap much of the E.P.A.'s vitality. Such a construction would create unnecessary problems for future courts attempting to construe the Act. We determine that the district court erred in finding that Fields' violations were not wilful for the purposes of the Portal-to-Portal Act's three-year statute of limitations. We remand with directions to modify the judgment so as to allow employees overtime and minimum wages for a period of three years from the date that the cause of action accrued.

VI. *THE CHAIN-WIDE INJUNCTION*

The district court by its decree enjoined Fields from violating the provisions of the Equal Pay Act "in any of its stores now in operation and hereafter operated by it . . ." Fields here challenges the issuance of a chain-wide injunction on the facts of the instant case, and urges that the injunction be modified. In support of the district court's injunction the Secretary points out that the violations in the instant case occurred in the context of close centralized supervision over wage scales and pay policies in the individual stores, and urges that a chain-wide injunction was appropriate to restrain what had apparently been a company policy regarding hiring and setting of wage scales.

We start with the rubric that the granting of injunctive relief in FLSA suits is a matter within the sound discretion of the district judge. We will not overturn or modify an injunction in such suits without a showing of clear abuse of that discretion. In determining the existence vel non of an abuse of discretion it is

necessary to examine policies underlying the FLSA and the purposes served by injunctions in suits under the FLSA. *Wirtz v. Ocala Gas Co.*, 5 Cir. 1964, 336 F.2d 236, 240.

See *Goldberg v. Cockrell*, 5 Cir. 1962, 303 F.2d 811 814, where we considered the role of the injunction in the context of the FLSA:

> "Issuance of an injunction in cases such as these does not subject an employer to any penalty for his past violations of the law. It merely says: in the future do what the law requires you to do. The injunction shifts the responsibility for compliance onto the employer's shoulders. * * * The Wage and Hour Division cannot reasonably be charged with the responsibility of checking back on past violators to make sure that they are obeying the laws. Fairness and economy of administrative effort both dictate that after an employer has once violated the Act he should bear his own responsibility for the future."[10]

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[10]This approach was justified by this statement in the opinion:

> "* * * Unlike most statutes regulating conduct, the Fair Labor Standards Act does not carry any immediate sanction. In effect it gives each employer one free offense: on proof of violation he is liable at most for repayment of the wages that he originally should have paid his employees, to the extent that the unpaid wages can be proven. This rule may be justified on the basis of avoiding punishment of those who are ignorant of the law or do not believe that it applies to them; but no law can be effectively enforced if individuals are allowed to make repeated violations of it with impunity. One unexplained offense is enough." 303 F.2d at 814.

In *Wirtz v. Ocala Gas Co.*, supra, at 240, we noted further:

> "Inasmuch as [the injunctions] are a means of effecting general compliance with national policy expressed by Congress, they are to be utilized in the light of the purposes of the Act, in aid of the administrative efforts at enforcement, and not grudgingly."

See further our statement in *Hodgson v. First Federal Savings and Loan Ass'n.*, 5 Cir. 1972, 455 F.2d 818, 826, that "courts should not be loath to issue injunctions of general applicability." We review the context in which the injunction in the instant case issued in the light of these principles.

Fields, as stated, has more than sixty stores in its chain. Evidence introduced at trial indicated that Fields' hiring and wage policies were subject to centralized control of a significant degree. It was hardly an abuse of discretion in these circumstances for the district court to enjoin Fields as a corporate defendant rather than to enter a limited injunction against the individual stores found to be in violation of the Equal Pay Act. It would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction. Considerations of administrative necessity are persuasive as warranting the chain-wide injunction issues below. Again we quote *Wirtz v. Ocala Gas Co.*, supra, at 240:

> "These FLSA injunctions are not excessively burdensome as this Court has pointed out heretofore. They subject the defendants to no penalty or hardship. They require no more than that the defendant comply with the law. [Citation omitted] Their aim is remedial and not punitive.* * *"

We find that the issuance of a chain-wide injunction in this case was not an abuse of discretion, and affirm the district court on this point.

The language of the injunction was overly broad in this one respect: the district court framed its injunction in terms that apply not merely to the class of employees involved in the instant litigation, the Area Supervisors, but as well to all Fields' employees. There was no proof of discrimination in classes of employees other than Area Supervisors, and accordingly we direct that the terms of the injunction be modified to limit its applicability to this class of employees. The language contained in the injunction against further violations of the Equal Pay Act should be modified by substituting the term "Area Supervisor" for the term "employee(s)". Cf. *Hodgson v. Corning Glass Works*, 2 Cir. 1973, 474 F.2d 226.

AFFIRMED in part, REVERSED in part, MODIFIED in part, and REMANDED for further consideration.

U. S. Court of Appeals Modification on Rehearing

INDEXED

Peter J. BRENNAN, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee-Cross Appellant,

v.

J. M. FIELDS, INC., Defendant-Appellant-Cross Appellee.

No. 72-1066.

United States Court of Appeals, Fifth Circuit.

Jan. 17, 1974.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITIONS FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 16, 1973, 5 Cir., 1973, —— F.2d ——).

Before TUTTLE, WISDOM and SIMPSON, Circuit Judges.

PER CURIAM:

The motion of the Secretary of Labor to strike the last paragraph of the Court's opinion of November 16, 1973, is not passed upon.

The Secretary of Labor's alternative petition for rehearing is granted to the extent that the last paragraph of the body of the printed slip opinion, page 16, commencing with the words "The language of the injunction * * *" and ending with the words "* * * Cf. Hodgson v. Corning Glass Works, 2 Cir. 1973, 474 F.2d 226." is withdrawn in its entirety, and said petition is otherwise denied.

BRENNAN v. J. M. FIELDS, INC.

The petition for rehearing of J. M. Fields, Inc. is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is denied.

Judgment of the U. S. District Court, Middle District of Florida

[Caption Omitted]

JUDGMENT

This cause came on for trial before this Court sitting without a jury on the 8th day of June 1970. The Court having considered the pleadings, the oral testimony and the exhibits, the arguments and briefs of counsel; and the Court having heretofore on June 24, 1971, entered its findings of fact and conclusions of law; and in accordance with such findings of fact and conclusions of law, it hereby is:

ORDERED, ADJUDGED and DECREED that the defendant, J. M. Fields, Inc., a corporation, its officers, agents, servants, employees, attorneys and all persons acting or claiming to act in its behalf and interest be, and they hereby are, PERMANENTLY ENJOINED from violating the equal pay provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201, *et seq.*], hereinafter referred to as the Act, in any of its stores now in operation and hereafter operated by it, in that they:

> SHALL NOT, contrary to sections 6(d) and 15(a)(2) of the Act [29 U.S.C. 206(d) and 215 (a)(2)], discriminate, within any of the defendant's stores, between employees on the basis of sex by paying wages to employees in any such store at a rate less than the rate at which they pay wages to employees of the opposite sex in such store for equal work on jobs the

performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendant be, and it hereby is, restrained from withholding payment of minimum wages and overtime compensation found by the Court to be due defendant's employees, as a result of the defendant's wage discriminations on the basis of sex, for the periods of employment and in the amounts as set forth in Schedule "A" attached hereto and made a part hereof. It is

FURTHER ORDERED that within fifteen (15) days following entry of this Judgment, the defendant shall deliver to plaintiff's attorneys a cashier's or certified check payable to "Wage and Hour Division—Labor" in the total amount stated in Schedule "A" hereto, *less* deductions required by law as to each employee.

The defendant shall also provide plaintiff's attorneys with a schedule showing its employer identification numbers and the last-known address, social security number, gross amount, deductions and net amount as to each of the employees listed on Schedule "A" hereto.

Plaintiff shall distribute the proceeds of such check to said employees, or to their heir or heirs, and any money not so distributed within the period of three years, because of inability to locate the proper persons or because of their refusal to accept it, shall be covered

into the Treasury of the United States as miscellaneous receipts.

It is ORDERED that costs of this action be taxed to the defendant for which execution may issue.

DONE and ORDERED this 29th day of November, 1971.

/s/ GEORGE C. YOUNG
UNITED STATES DISTRICT JUDGE

[Filed Nov. 29, 1971]

Schedule "A" J. M. FIELDS, INC.

Employee	*Period From*		*To*	*Amount*
Tallahassee (Softlines):				
Elaine Hanna (Parrish)	10/ 1/66	-	1/31/69	$ 1,984.32
Eleanor Poston	6/14/66	-	1/31/69	2,590.56
Shelley Willis	7/ 1/67	-	1/31/69	1,542.84
		Total	-	$ 6,117.72
Tallahassee (Hardlines):				
Mary Finley (Eure)	11/ 4/67	-	3/ 4/68	$ 367.92
Lucy Howell (Taylor)	6/14/66	-	2/26/68	2,418.52
Kathrine Johnson	11/14/69	-	6/ 8/70	1,028.00
Audry Lowney	12/27/66	-	11/ 1/69	3,016.16
Daveen Screeton	3/ 4/68	-	6/ 8/70	1,781.72
Martha Skipper	4/22/68	-	6/ 8/70	1,657.00
Peggy Smith	8/ 1/66	-	9/10/69	3,008.28
Ola Mae Woodson	10/ 6/69	-	6/ 8/70	817.60
		Total	-	$14,095.20
	Total - Tallahassee		-	$20,212.92

Employee	Period From		To	Amount
Eau Gallie (Hardlines):				
Salome Burton	6/14/66	-	5/ 4/69	$ 1,413.94
Ruth Derry	6/14/66	-	5/ 4/69	2,738.40
Maxine Johnson	6/14/66	-	5/ 4/69	2,926.88
Lorraine Lunden	6/14/66	-	5/ 4/69	960.96
Ann Manning	6/14/66	-	5/ 4/69	2,005.84
		Total	-	$10,046.02
Merritt Island (Hardlines):				
Shirley Giannini	9/ 2/67	-	12/28/69	$ 1,224.20
Mildred Sutherland (Meyers)	6/14/66	-	11/22/66	379.08
		Total	-	$ 1,603.28
GRAND TOTAL - ALL STORES			-	$31,862.22

Findings of Fact and Conclusions of Law

This action was brought by the Secretary of Labor as plaintiff, against defendant, J. M. FIELDS, INC., seeking to enjoin alleged violations of the Fair Labor Standards Act of 1938, Title 29, United States Code, §§201 *et seq* and to restrain the defendant from withholding payment of back wages due employees under the Act.

The gist of the action is the claim that defendant in its Tallahassee, Eau Gallie and Merritt Island, Florida stores, since June 15, 1965 has discriminated in that class of employees known as "Area Supervisors"[1] on the basis of sex by paying women lower wages than men for work requiring equal skill, effort, and respons-

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[1]With the exception of those persons in charge of supervising the stock room and the major appliances departments which positions the Secretary does not challenge.

ibility, and performed under similar working conditions.

The Court, having heard the evidence and arguments of counsel and having considered the post trial briefs, makes the following Findings of Fact and Conclusions of Law and Order for Judgment herein:

FINDINGS OF FACT

1. The involved stores, operated by the defendant, are essentially self service discount retail establishments handling a broad range of merchandise.

2. During the period in question there existed in defendant's stores a job classification "Area Supervisor".

3. An Area Supervisor was responsible for the general management of one or more departments such as housewares, lamps, rugs, glassware, toys, sporting goods, radics, traffic appliances, health and beauty aids, garden shop, pets, domestics, drapes, bath shop, cameras, records, ladies' wear, notions, luggage, mens' wear, boys' wear, girls' wear, infants' wear. bras, panties, slips, hosiery, men's socks, ladies sportswear, handbags, and shoes.

4. The duties of an Area Supervisor in charge of one or more of these departments included, but were not limited to:

(a) Supervision of floor personnel.
(b) Customer assistance.
(c) Quality control of merchandise.
(d) Comparison shopping.
(e) Recommendations as to price mark downs on merchandise.
(f) Relief of the "front" supervisor during lunch and breaks.
(g) Recognition and ordering of "hot items" or items that were selling well.

5. In retail merchandising there are recognized two broad lines of goods; soft lines which are clothing, and hardlines which are all lines but clothing.

6. In the defendant's stores there existed in the softlines departments an automatic replenishment system whereby one-half of the sales ticket on the items sold was torn off and collected by the cashier and then sent to a central office from which replacement stock was ordered.

7. In the hardlines departments ordering was accomplished by means of "pre-print" books, which orders were initiated by the Area Supervisor on the basis of the inventory level.

8. The method of ordering in the hardline departments imposes on those Area Supervisors an added responsibility which required a substantial portion of their working time.[2]

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[2]Witness Peggy Smith, a Tallahassee hardlines supervisor testified that she spent four hours a day working on the pre-print books.

9. The skill and responsibility required of hardline managers is substantially greater than that required of softline managers.

10. From September 26, 1966 until February 1, 1969, men Area Supervisors of softline departments in defendant's Tallahassee store were paid an average of $.35 per hour more than women.[3]

11. There has been no wage discrimination on the basis of sex among Area Supervisors in charge of softline departments of the Tallahassee store since February 1, 1969.

12. From February 8, 1966 until August 15, 1969 (which is as far as the personnel records for men Area Supervisors in charge of hardlines at defendant's Tallahassee store are complete), men Area Supervisors of hardline departments in the Tallahassee store were paid an average of $ .45 per hour more than women. (Table "B").

13. As of August 15, 1969, men Area Supervisors in charge of hardlines at defendant's Tallahassee store were being paid an average of $ .35 per hour more than women. (Table "B").

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[3]This figure represents the approximate average hourly wage differential over the 28 months from September 26, 1966 to February 1, 1969, as compiled from table "A". Table "A" was prepared from the Tallahassee employees personal records (Plaintiff's Exhibit 3). This same method was used in compiling all wage discrepancies.

14. From June 15, 1965 until May 4, 1969, men Area Supervisors of hardline departments in defendant's Eau Gallie store were paid an average of $ .27 per hour more than women. (Table "C").

15. There has been no wage discrimination on the basis of sex among Area Supervisors in charge of hardline departments of the Eau Gallie store since May 4, 1969.

16. The evidence does not establish that women Area Supervisors of softline departments in defendant's Eau Gallie store were paid less than men.

17. From June 15, 1965 until her termination, November 22, 1966, Mildred Sutherland, for managing the hardline department of health and beauty aides, received $ .40 per hour less than men Area Supervisors of hardline departments in the Merritt Island store. (Table "D").

18. From May 8, 1967 until December 28, 1969, Shirley Giannia, for managing the hardline departments of domestics and drapes, received $ .20 per hour less than men Area Supervisors of hardline departments in the Merritt Island store. (Table "D").

19. There has been no wage discrimination on the basis of sex among Area Supervisors in charge of hardline departments in the Merritt Island store since December 28, 1969.

20. The evidence does not establish that women Area Supervisors of softline departments in defendant's Merritt Island store were paid less than men.

21. With regard to the wage discrepancies in findings 10, 12, 13, 14, 17 and 18, J. M. Fields, during the periods in question, hired and paid its employees at whatever rate it could get them, the overall result of which was to discriminate against women. (Although there were a few instances in which men employees were paid less than women, it is the overall effect with which the Court is concerned.)

22. The jobs of hardline and softline managers differ substantially so that they should not be compared for purposes of the Equal Pay Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter. Title 29, United States Code, §217.

2. Because the wage discrepancies in findings 10, 12, 13, 14, 17 and 18 were discriminations on the basis of sex, they constituted violations of the Equal Pay Act.

3. The violation of the Equal Pay Act in the hardline departments of defendant's Tallahassee store were continuing as of August 15, 1969, the last date for which personnel records sufficient to determine a violation were available.

4. The violations were and are not willful. Although, as noted in finding 21, the defendant's hiring practice

had the overall effect of discrimination in some lines against women, that was a result and not an intentional purpose of defendant in its employment practices. Therefore, the two year statute of limitations is applicable, and actions for any wage discriminations prior to June 14, 1966 are barred. Title 29, United States Code, §255(a).

5. The plaintiff is entitled to an injunction, enjoining defendant from future wage discrimination on the basis of sex in any of its stores.

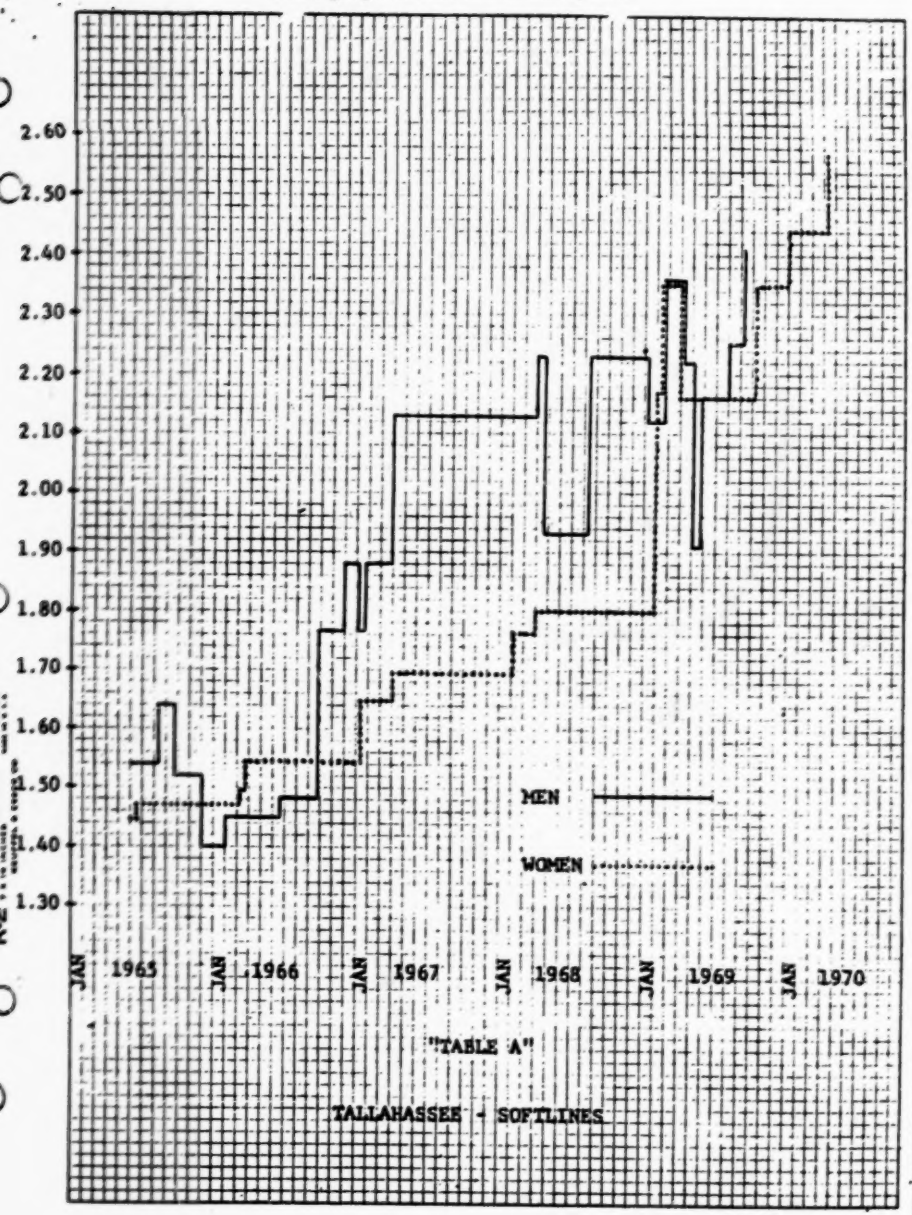
6. Each female employee whose pay was less than the average paid to men during the periods of wage discrimination covered in findings 10, 12, 13, 14, 17 and 18, subsequent to June 14, 1966, are entitled to payment from the defendant of the difference between such average men's pay and the wage actually paid such female employee.

Counsel for plaintiff shall prepare, within thirty (30) days from date hereof, a proposed judgment in accordance with the foregoing. The average men's pay to be used in computing the unpaid wages due to each individual female employee is the average designated by the solid lines on the applicable one of the tables attached hereto.

DATED at Orlando, Florida, this 24th day of June, 1971.

/s/ GEORGE C. YOUNG
United States District Judge

[Filed June 24, 1971]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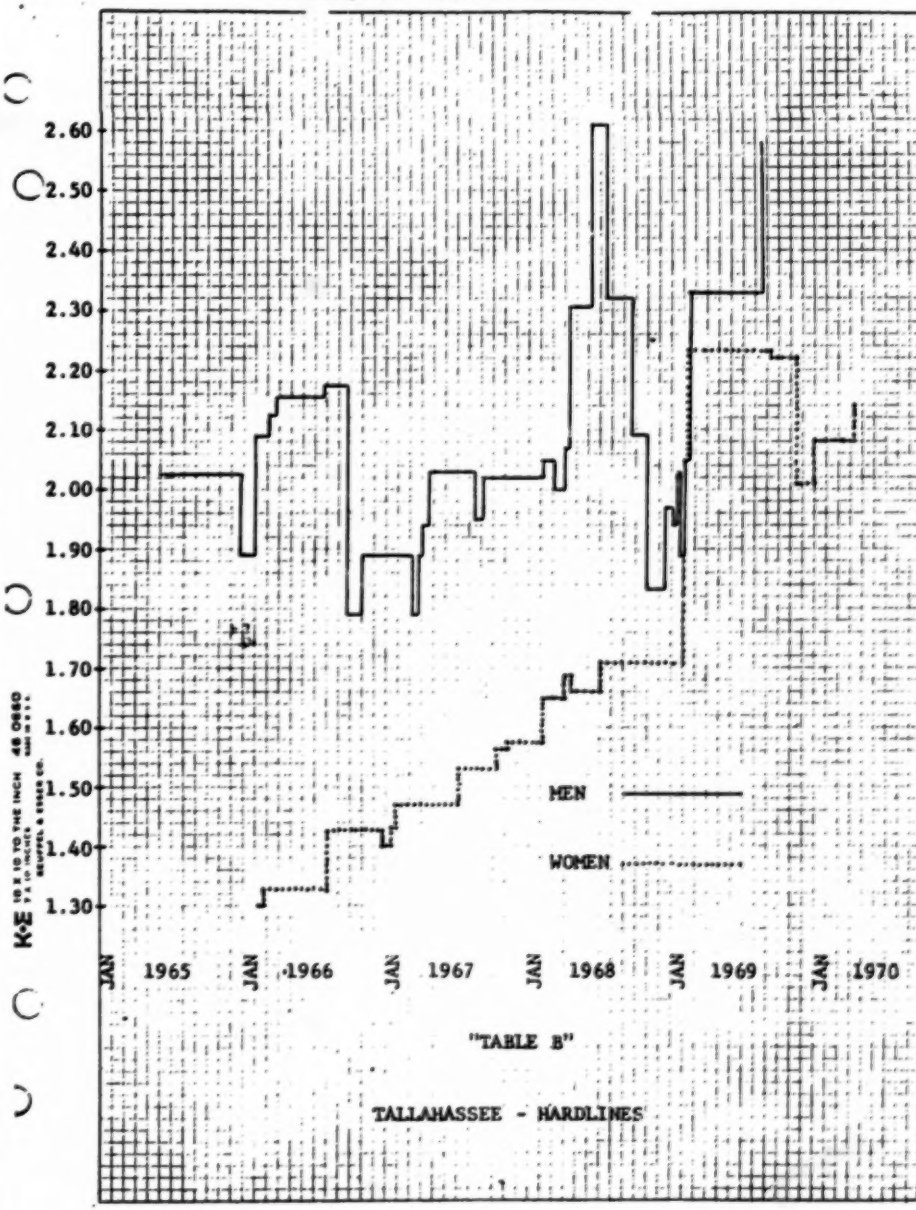
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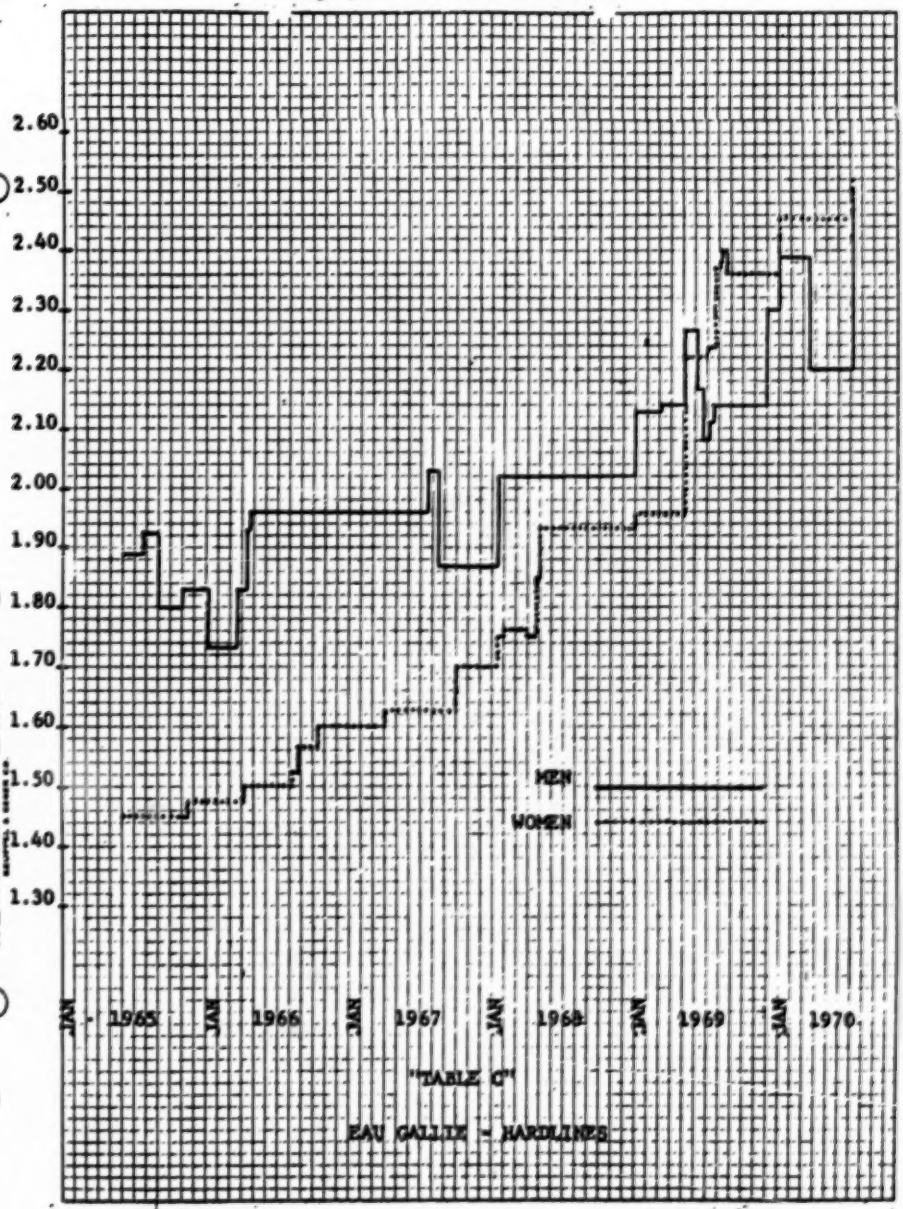
"TABLE B"
TALLAHASSEE - HARDLINES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JAN 1965
JAN 1966
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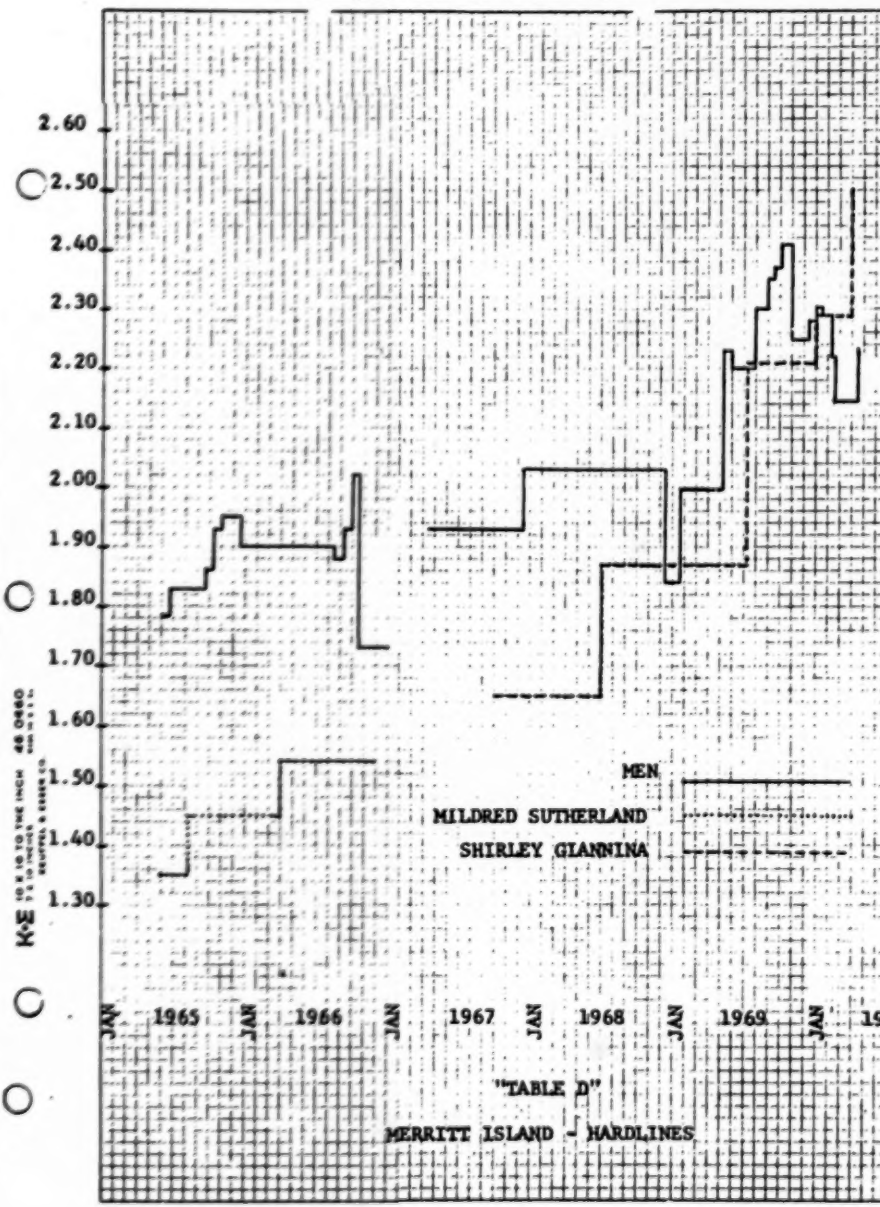
JAN 1969
JAN 1970
"TABLE C"
EAU GALLIE - HARDLINES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K-E
MEN
MILDRED SUTHERLAND
SHIRLEY GIANNINA
JAN 1965
JAN 1966
JAN 1967
JAN 1968
JAN 1969
"TABLE D"
MERRITT ISLAND - HARDLINES

Excerpts From the Minutes

Testimony of Ray C. Simmons

[455] Q During your tenure, has the company had any policies with regard to personnel or the administration?

A Oh, absolutely.

Q During your tenure, has there been a company policy with respect to hiring employees at the store level at Eau Gallie, Tallahassee, Merritt Island?

A Yes, sir.

Q Do you know what the policy is?

A The hiring of employees or department managers or what?

Q Let's talk — since the case involves department managers, is there — do you know what the policy is with respect to department managers at those three stores?

A Yes, sir, the store manager is responsible for recruiting, interviewing, selecting and hiring his own department managers.

Q Is this a companywide policy or is this a policy that just applied to the three stores in this case?

A This is companywide policy.

Q Has the policy been the same or different or has it changed since June of 1965?

[456] A The policy has been the same. There is one exception that I might relate. When we open a new store, it is my responsibility at that time to go into the area and assist the store manager in the recruitment and selection of all of the people, because it would be such a burden on him to do it himself in a short period of time.

Q Does the policy on hiring department managers include consideration of what factors go into hiring?

Richard Mars?

A Yes.

Q Was Richard Mars an area supervisor?

A Richard Mars was a department manager and stock control manager.

Q Did you ever call Mr. Mars an area supervisor?

A No; not to the best of my recollection.

Q Was the term, area supervisor, not used in Tallahassee at all?

A It might; I never used it.

Q As part, do you have any duty with respect to hiring people to work?

A Yes.

Q Do you hire department managers?

A Yes.

Q When you hire department managers at your store how do you decide what to pay them, or what to offer them?

A Job involvement; they are, they are experienced, their background and what the labor market would call for.

Q Do you have any instructions from your company concerning how much to pay or what not to pay?

A We had a few years ago; yes.

Q When you hire a person to be a department manager do you have any qualifications that you look for in a [717] person for a job?

A Yes.

Q What do you look for; what do you consider?

A Well, look at their experience, have they worked in other retail outlets; what do they do for other retail outlets; what was their rate of pay when they left, if

Q Did you have any responsibility as the manager of the Merritt Island store to hire people?

A Yes, I was required to see that the store was properly staffed.

Q When you hired department managers, how did you decide what to offer as pay to do a job?

A Well, I always naturally had to keep in mind my budget limitations.

Q What was the budget limitation?

A We received directions from our central office as to the amount of budget to be used for payroll, and we had to properly staff the store, keeping in mind our budget requirements.

Q What other things did you consider?

A Well, we took into consideration experience, experience that we could relate to our particular type of field. We took into consideration primarily what we thought the person could do for us.

[609] Q When you hired someone to work in a soft lines department, what qualifications did you look for?

A Well, our requirements in that particular line weren't necessarily too stringent. We were more frequently impressed by a person's appearance and their attitude and their impression that they made on us and what they had in mind to accomplish in life.

Q Is there any difference in the qualifications that you look for in a person to go into hard lines as opposed to soft lines?

A Yes, I would be necessarily looking for a much longer span of experience and I'd have to have some more positive evidence the person would be able to function as a hard lines supervisor or manager.

Testimony of Mr. Henry

Q Were you always able to get experienced personnel at Merritt Island?

A No. As we mentioned a minute ago, we had to finally resort, because of conditions on the Island at that time, to go to our other stores and bring in some help, experienced help.

Q Were the qualifications that you considered [610] in hiring people the same for men and women?

A I don't quite understand that question.

Q When you hired someone, did you look for anything different in a man than you did in a woman to do a particular department manager's job?

A No, I wouldn't say we had any particular thing in mind as far as a man or woman is concerned.

Q In hiring a person as a department manager, what consideration, if any, did you give to past earnings?

A We gave a lot of serious thought to it. And if we felt we could acquire the services of a high-priced person for less and we could negotiate this price, we would. Or we met his present price. I am talking about quality being equal to what we were looking for.

Q In hiring persons as department manager, what consideration, if any, did you give to the current retail volume of inventory in a particular department that you were seeking to get someone for? Is that something you considered?

A I think it's safe to say that I have never [611] associated the hiring of someone with the relationship to volume or inventory peaks. The key to our success is to operate at a very, very fast inventory, which nec-

essarily means there is as low an inventory as possible.

Q As the store manager at Merritt Island, what, if anything, did you have to do with pay raises for employees in your store?

A We usually, over a period of time, reviewed a person's performance and made certain recommendations on the performance, and sometimes when we were rating a person, we would also at that time recommend a pay increase for them.

Q Did you take anything into consideration in recommending a pay increase?

A Yes, we did. The length of time they were with us. The type of work they were performing. How they were functioning. Their value to us. All those things I think which are normal in considerations.

Q Did you have the same considerations for men as you did for women employees?

A I think the key there was we looked at performance rather than anything else.

[612] Q During the time that you were at Merritt Island, did the company have an executive training program or a program to develop people for management?

A Yes, they did.

Q How did you know about it?

A Well, of course, we always received directives from our central office informing us of company's plans and programs, and no doubt during sometime or another, I received some direction saying they had a program and I followed through on it.

Q Do you know whether or not the department managers in your Merritt Island store were made aware

a direct contact with the customer, if they would pick it out and buy it themselves.

Q When you left the Eau Gallie store were you using department managers, area supervisors or both?

A I used them both.

Q Who hired people for jobs as department managers or area supervisors at the Eau Gallie store while you were there?

A When the store first opened these people were hired by a personnel representative from the New York office, and after the store was opened and they left for various reasons, my assistant was, would interview them. If it was a department manager and we would mutually decide whether or not I would make the final decision as to whether or not we would hire them.

[672] Q What considerations did you take into account in connection with hiring someone; what things did you think about with relation to the person who you were going to hire as to why you would hire them or not hire them?

A If it was at this level, usually the most important thing would be their past experience, their past rate of remuneration, and what potential they had as far as advantage in our company.

Q How did you decide what to offer as pay?

A We would decide what, what to offer, based on what they had been makin , and also what the market, and in this particular category was, in the area, and what my budget would allow, and what it could produce to make it worth what we could pay them.

Q What do you mean when you considered what the market was in a particular area?

A Well, in this area, at that particular time, the labor market was pretty tight, and it was a little hard to get good people unless you did pay the going scale. We had a survey made of all the competing, all the competent stores in the area, and we knew what the scale was for the entire area.

Q Did you have any directives from the company concering rates of pay in which to hire people at?

[673] A We had guidelines.

Q In interviewing a person for a job as a department manager, what qualifications; was there any difference in the qualifications between someone being hired in the hard line and someone being hird in the soft line?

A I would say there was considerable difference, due to the technical nature of the hard line areas. Of course, the soft lines areas —

A In hiring the new employee to become a department manager, were the qualifications that you looked for any different as between men and women applicants?

A The qualifications between men and women, I actually wouldn't look for any difference in the qualifications. I wouldn't see any reason unless it was for an area; if a woman has the proper qualifications it wouldn't make any difference what area she was going into, if she was qualified.

Q As the store manager of Eau Gallie, did you have anything to do with the pay raises after you hired employees, and they worked for you?

A Yes, sir.

Q What did you do in that regard?

A I would appraise the person, and if in my opinion the appraisal showed they were entitled to an increase in [674] pay I would institute a request for an increase in pay and forward it to the district manager.

Q What things, if anything, did you consider when making a change in pay for one of your department managers?

A I considered the type of work they were doing; if they were actually performing to our standards; if the departments were being maintained the way they should; if we were getting, in the sales, if the sales were where they should be; if they were conforming to company policy, and if they were, merited an increase.

Q During your tenure at Eau Gallie, did the company have an executive training program?

A We had an executive training program; yes, sir.

Q How did you know about it?

A We had a letter from our New York office from the Industrial Relations division, and informing us of it.

Q Did you have any employees at your store in Eau Gallie while you were there who were involved in the executive training program?

A Yes, sir.

Q Did you ever during the time you were at Eau Gallie discuss the executive training program with any of your employees?

A Yes, sir.

Q What was the nature of these discussions, and who did [675] you discuss the training program with?

Q Is this a policy that's applicable to the three stores in this case?

A Yes, sir.

Q Has the policy — has this been the same policy that's been in effect during your tenure with the company?

A Basically, yes. I think at one time we did not necessarily do the 90-day review on a consistent basis, but other than that, it has been.

Q Are the factors in doing the review the same for the men and the women department managers and employees?

A Yes, sir.

Q In your position as regional personnel manager, do you ever have the occasion to look at these reviews or take part in a review process?

[460] A I have occasion to look at the reviews.

Q Are they something in writing?

A Yes, we have a nonsupervisory appraisal form and we have a department manager appraisal form.

Q Have you ever had the occasion to discuss these reviews with employees who were subject of the reviews?

A I don't recall any at this time.

Q Is there a person in the company who would normally have such a function?

A Yes.

Q Who would that be?

A The store manager.

Q Would that be the store manager in each of the three stores in this case?

Testimony of Ray C. Simmons

[448] DIRECT EXAMINATION

BY MR. SUBIN:

Q Are you Ray C. Simons?

A Yes, I am.

Q Are you the same Ray Simons who testified earlier in this case?

A Yes, sir.

Q You understand that you are under the same oath that you were administered at the time that you took the stand a day or two ago?

A Yes, I do.

Q Where do you reside, Mr. Simons?

A 4449 Fulton Road, Jacksonville.

Q What is your occupation?

A Southern regional personnel director for J. M. Fields.

[449] Q How long have you had that occupation?

A Six years.

Q Where is your office?

A Jacksonville, Florida.

Q Will you please define your duties.

A Yes, sir. I am responsible for the interviewing and recruiting of management type personnel. I am responsible for travel in the field to see that the stores follow company policies and company procedures as set forth by our company to see that the stores are in compliance with the Federal Wage Hour Laws, the Equal Opportunity Laws, the Equal Pay Laws, and

the various assortments of state and federal regulations concerning the stores.

I also am responsible for wage and salary administration in the field. I am responsible for visiting with the store employees, the store managers, checking on the morale of the various stores or the morale of the employees in the various stores.

I see when I go into the stores that the stores are maintaining their personnel files in the manner as prescribed by company policy. I am responsible for certain [450] training activities of the company. I am responsible for seeing that our training program and the training of future company executives is carried out.

Q Mr. Simons, what geographical area do your duties encompass coverage of?

A From Wilmington, North Carolina, on the northern border to Miami, Florida, on the southern border.

Q Do you have responsibility to perform your duties with respect to the J. M. Fields in Tallahassee, Florida; Merritt Island, Florida; and Eau Gallie, Melbourne Florida?

A Yes, sir, I do.

Q Do you report in the course of your duties to any other employee in the company?

A Yes, I report to Mr. Jerry Walker.

Q And do you know what his title is?

A Vice-president of industrial relations.

Q Where is his office, please, sir?

A New York.

Testimony of Jerry Walker

BY MR. SUBIN:

Q Mr. Walker, do you know whether or not there is a company policy with respect to clients with Federal laws having to do with employment practices?

A I know that the company policy is in all cases is to comply with the Federal laws.

Q Do you know whether or not that policy is applicable company wide?

A It is.

Q Who is responsible, directly responsible at the top level of the company management structure for compliance with the Fair Labor Standards Act?

A Well, if you want to know who would be held accountable in the company, it would be yours truly.

Q What if anything do you do to insure, compliance with the Fair Labor or Standards Act as a part of your official duties?

[762] A What I have done is to publish a host of instructions; all letters and notes at any time they might have been a change in the minimum wages, for example, the qualification for exemptions from the minimum wage law periodically, just for good health, I would publish such instructions.

We hold meetings in our district; in our company there are nine districts. They hold training meetings with their store managers periodically. And I have attended, in the last three years a minimum of 15 such district meetings, and at such times talked about compliance with labor laws, among other things.

Additionally, we have held, since I have come to the company, three store managers training conferenc-

es, and at each of these training conferences the store managers assembled as a group, I have personally discussed these issues; further these training conferences are operated in a conference style, or in a case method style.

At least one problem each year is devoted to manager responsibility and the administration of the people within this store; and these conferences are headed by conference leaders trained by me as to what is to come out at the conference.

Q During the time you have been with J. M. Fields have [763] these conferences and these different things you have just described included a contact with the managers at the Tallahassee, Merritt Island and Eau Gallie stores?

A I have visited each of those stores at least twice, I think, maybe three, three times, and it would be quite natural to discuss in the store, first of all, I make a routine inspection to see if they have their posters up, and that stuff.

And, I would never discuss with them issues relating to those points, to the store managers.

Q Do those stores attend the conferences you have mentioned?

A Oh, yes.

Q Mr. Walker, I hand you a document which I am going to ask the clerk to mark as our next document for identification purposes, 17.

THE CLERK:

Defendant's Exhibits 18, 19 and 20 for identification.

Defendant's Exhibit 11

TO: OFFICE MANAGERS
DISTRICT MANAGERS
STORE MANAGERS

FROM: INDUSTRIAL RELATIONS DIVISION

SUBJECT: New Record Keeping Regulations

DATE: May 18, 1964

As you know, the Equal Pay Act becomes effective June 11th, 1964. Such act prohibits wage differentials based on sex.

Based on a review of the current situation, your company is in full compliance of the new law.

However, it is now necessary that all employers shall be required to record the sex as well as the occupation of employees on records which shall be preserved for at least two years.

For our purposes you may record the sex of employees either by use of the prefixes Mr., Mrs. or Miss, or by the words "Male" or "Female".

If you have any questions relating to the above Federal regulation, please contact this office.

Defendant's Exhibit 12

TO: Store Managers

FROM: Industrial Relations Division

DATE: March 25, 1966

SUBJECT: Equal Pay Law

Please be reminded that it is a violation of a federal law to hire people at dissimilar rates merely on the basis of sex.

For example, persons hired to do exactly the same job, who both bring the same amount of experience and background to that job, should receive identical rates of pay.

Obviously, there are legitimate reasons why either a woman or a man is worthy of being hired at a higher rate of pay than another candidate. Such reasons must be logical and factual, however, and must be clearly noted on the employment application at the time of hiring.

(Signed) MORTON D. SIEGEL

cc: District Managers
Regional Personnel Directors

Defendant's Exhibit 17

DATE: April 25, 1968

TO: R. Hunt
R. Simmons
R. Bengraff
District Managers
Store Managers

FROM: J. A. Walker

SUBJECT: Equal Pay for Equal Work

The law at present forbids paying different wages to men and women who are performing essentially the same work when the difference in pay occurs only because of the sex of the individual. In our *scheduling and compensating* employees, especially Department Mgrs. it is imperative that we remember this fact.

It is perfectly proper to pay one employee more than another based upon personal qualifications or difficulty of the job. Problems will occur when we have a male and a female employee with essentially the same background and qualifications performing work requiring the same degree of skill and knowledge but receiving different compensation.

The government is enforcing this principle through its Wage and Hour Division.

Responsible executives should at once study their staff to be certain that we are not in violation of the law.

District Managers should advise me promptly of any problems to foresee.